Supreme Court, U. S.
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79-1087

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-_____

LEEWARD PETROLEUM, LTD.,
A Bermuda Corporation,
*Petitioner*

v.

MENE GRANDE OIL COMPANY,
A Delaware Corporation, and
GULF OIL CORPORATION
A Pennsylvania Corporation,
*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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LEEWARD PETROLEUM, LTD.,
A Bermuda Corporation,
*Petitioner*

v.

MENE GRANDE OIL COMPANY,
A Delaware Corporation, and
GULF OIL CORPORATION
A Pennsylvania Corporation,
*Respondents*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the Third Circuit Court of Appeals' dismissal of the petitioner's appeal from the May 15, 1979 order of the United States District Court of Delaware.

## OPINIONS ENTERED BELOW

On May 25, 1976, an opinion was entered in this cause by the Delaware District Court denying the defend-

ants, Gulf Oil Corporation's and Mene Grande Oil Company's, 12(b)(6) motion to dismiss. *Leeward Petroleum, Ltd. v. Mene Grande Oil Co.*, 415 F. Supp. 158 (D. Del. 1976). This decision was not appealed to the Court of Appeals for the Third Circuit, and thus is not in issue herein on petitioner's request for certiorari.

On May 15, 1979, an order (Appendix C, *infra* at 24) was entered by the Delaware District Court denying Leeward Petroleum's motion to enjoin the defendants from prosecuting a duplicitous action in Venezuela. This order also granted the defendant's motion to stay the Delaware proceedings and declined a motion for summary judgment as to the antitrust claims of Leeward. After instituting an appeal from the injunctive and stay portions of this order, an order issued in lieu of a formal mandate—to be treated in all respects as a mandate—was rendered by the Court of Appeals for the Third Circuit denying appellate jurisdiction (Appendix G, *infra* at 37). It is the propriety of this order denying appellate jurisdiction, when considered in light of the Delaware District Court's order, that is in issue herein.

## JURISDICTION

The dismissal of the appeal by the Court of Appeals for the Third Circuit was rendered on October 15, 1979. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

## QUESTION PRESENTED

Whether a circuit court of appeals may, in direct derogation of a U.S. statute, summarily dismiss as non-



appealable under § 1292(a) of the Judicial Code an order which, on its face, declines to enjoin duplicitous and concurrent litigation in a foreign forum and which also temporarily stays a first-filed action in a domestic forum.

## STATUTE INVOLVED

The relevant portion of the Judiciary Code is as follows:

§ 1292. Interlocutory Decisions.

(a) The Courts of Appeal shall have jurisdiction of appeals from;

(1) Interlocutory Orders of the District Court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands, or the judges thereof, granting, continuing, modifying, *refusing* or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. . . . (Italics added).

## STATEMENT OF THE CASE

This case presents a breach of contract action instituted initially in the Delaware District Court by the Plaintiff, Leeward Petroleum, Ltd. (Leeward). The merits of this cause have never been reached, as one of the Defendants, Mene Grande Oil Corporation (Meneg), by filing a declaratory judgment action in Venezuela (currently still pending), forced Leeward into a procedural revolving-door requiring it to prosecute the same cause of action in two forums. Although a detailed analysis of the various

proceedings and motions leading up to the requested writ would be unduly burdensome, it is essential that mention be made here of the various motions pertinent to this petition.

On August 18, 1975, Leeward filed its original complaint in Wilmington, Delaware, against the defendants, Gulf Oil Corporation and Mene Grande Oil Corporation. The defendants countered with a 12(b)(6) motion to dismiss and a motion to dismiss or stay on *forum non conveniens* grounds (Appendix A, *infra* at 18). After an opinion was entered on May 25, 1976, denying Gulf's and Meneg's 12(b)(6) motion, *Leeward Petroleum, Ltd. v. Mene Grande Oil Co.*, 415 F. Supp. 158 (D. Del. 1976), all parties began extensive discovery and numerous depositions were taken in preparation for trial in Delaware. These depositions culminated in the production of hundreds of documents and over 1,000 pages of testimony. Yet, instead of bringing the motions on for hearing or filing papers in support thereof, both Gulf and Meneg chose to utilize the processes of the U.S. Court to their advantage. Pursuant to a meeting with the Delaware District Court on September 6, 1977, after discovery was nearing completion, Gulf and Meneg were advised to file their memorandum in support of their motion to stay and/or dismiss. Not until November 17, 1978, some two and one-half years after an opinion was rendered in the 12(b)(6) hearing, were the supporting papers finally filed by respondents.

Almost simultaneously, Meneg filed a declaratory judgment action in Venezuela on the contract issues before the Delaware District Court. This was almost three years after the filing of Leeward's complaint in Delaware. The



Venezuelan action sought a declaratory judgment as to two "threshold issues" which were being prepared for trial and which were embodied in Count I of Leeward's Complaint filed earlier in Delaware. These threshold issues dealt with whether or not Venezuelan governmental approval was required *as a matter of Venezuelan law* to complete the contract which was made the underlying basis of this suit. If approval was required, a second question posed to the Venezuelan court was the factual one of whether or not their governmental authorities had disapproved of the transaction. Both of these matters were subjects of the prior Delaware action and were near to resolution and/or were simple matters of proof of foreign law. Meanwhile, petitioner, being placed in the type of quandry Judge Friendly recognized in *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970),[1] attempted to fight the Venezuelan action by pleas of lis pendens. The Venezuelan action is presently on appeal in their courts.

Due to the duplication of costs and effort in prosecuting a cause of action in two different fora, and mindful of its right to choose its own forum for the trial of its lawsuit, Leeward filed a motion to enjoin the Venezuelan Declaratory Judgment Action (Appendix B, *infra* at 22). Finally, in an order dated May 15, 1979 (Appendix C,

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1. Judge Friendly noted:
   When they see a storm brewing in the first court, they may try to weigh anchor and set sail for the hopefully more favorable waters of another district. . . . [The Plaintiff in the first suit] is then put to the Hobson's choice of either going along with this ploy by agreeing to dismissal of the first action if the Plaintiff [in the second suit] is willing, or having to defend two lawsuits at the same. If he makes the latter election, as is his right, not only the parties but the courts pay a heavy price.
   422 F.2d 1197, 1203.

*infra* at 24), Leeward's motion to enjoin was denied without prejudice and Meneg's motion to stay the Delaware proceeding was granted. Thereafter, Leeward moved pursuant to § 1292(b) of the Judiciary Code for certification to the court of appeals of that portion of the district court's order relating to the stay of the Delaware proceedings. This motion was denied in oral hearing on the district court judge's assumption that certification at that point would delay Leeward's *right* of appeal pursuant to § 1292(a)(1) on the denial of the injunction by the Delaware court (Appendix D, *infra* at 27).

A timely appeal ensued (Appendix E, *infra* at 32), which was countered by Meneg's and Gulf's motion to dismiss on the grounds that the court of appeals lacked subject-matter jurisdiction (Appendix F, *infra* at 34). In an order dated October 15, 1979, the Court of Appeals for the Third Circuit granted Meneg's and Gulf's motion to dismiss on the grounds that jurisdiction was lacking (Appendix G, *infra* at 37). Because the court of appeals' dismissal for lack of jurisdiction conflicts with the specific statutory mandate of § 1292(a)(1) of the Judiciary Code and the unanimous case law construing it, petitioner urges this court to issue a Writ of Certiorari and reverse the decision of the court of appeals denying subject-matter jurisdiction.

## REASONS FOR GRANTING THE WRIT

### 1.

In its decree issued below, the Court of Appeals for the Third Circuit dismissed the petitioner's appeal from the district court's order, and therefore foreclosed all review entirely. In so doing, the decision is in conflict with:



(a) The express federal policy of § 1292(a)(1) of the Judiciary Code which gives courts of appeals jurisdiction over "[i]nterlocutory orders of the District Courts of the United States . . . refusing . . . injunctions. . . ." 28 U.S.C. § 1292(a)(1) (1979).

(b) The case law in this Court and the courts of appeal which, consistent with the specific mandate of § 1292(a)(1), has long and unanimously held that the grant or denial of a motion to enjoin duplicitous litigation in a foreign forum is appealable pursuant to § 28 U.S.C. § 1292(a)(1).

(c) Decisions issued by the courts of appeal which have recognized that when duplication of litigation is present, a motion to stay, when countered with a motion to enjoin, should be considered as one appealable venue question pursuant to 28 U.S.C. § 1292(a)(1).

### 2.

These conflicts pertain to the most important question of the statutory jurisdiction of the courts of appeal under 28 U.S.C. § 1292(a)(1) and require prompt and authoritative resolution by this Court. The dismissal of the petitioner's appeal by the court of appeals does violence to the congressional concern to allow specially excepted appeals from orders other than final judgments when they have a final and irreparable effect on the rights of litigants. It is a serious matter for a court to take the position of refusing all jurisdiction to a litigant with an unadjudicated cause quite within the court's statutory authority. Jurisdiction to litigate is not something to be withheld

or granted by a court at its wish or convenience. There is obviously a growing tendency in the congested courts of appeal to look for excuses to push a case off the docket, and even though sympathy might be had for the difficult situation facing over-worked judges, this is not a permissible course or one fair to litigants.

3.

## I. Conflict with the Express Federal Policy of Section 1292(a)(1) of the Judicial Code.

In the federal courts, appeals from interlocutory orders have been prohibited, with certain statutory exceptions, since the initial formulation of the "final judgment rule" in the Judiciary Act of 1789. 1 STAT. 73 (1789). This finality requirement, now embodied in section 1291, evinces a legislative judgment that "[r]estricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 170 (1972). Section 1292(a)(1) of the Judicial Code provides for an exception to the ordinary rule and allows appealability of all orders entered by district courts denying injunctions. 28 U.S.C. § 1292(a)(1) (1979). This section of the Judicial Code was enacted to permit litigants effectively to challenge interlocutory orders of "serious, perhaps irreparable consequence". *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181 (1955). The statute itself is the embodiment of a desire to balance the practicability of savings in time and expense with the need to give proper weight to aggrieved litigants.



On numerous occasions, it has been recognized that the efforts which culminated in the decision to enact § 1292 (a)(1) in its present form were of the legislative variety, as it was Congress which was thought to stand in the best position of weighing the relevant competing interests. Recognizing this fact, this Court has guarded against the expansion *or contraction* of the statute:

> This Court, however, is not authorized to approve or declare judicial modification. It is a responsibility of all courts to see that no unauthorized extension *or reduction* of jurisdiction, direct or indirect, occurs in the federal system. Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money.

*Baltimore Contractors, supra,* at 181-182 [citation omitted].

The record presented to the court of appeals in no way places in dispute the appealibility of the Delaware District Court ruling. The order provides, on its face, the following:

ORDERED As Follows:

1. The Motion of Leeward to enjoin Meneg from proceeding in the Venezuelan action is denied without prejudice.
2. The Motion of Meneg and Gulf to Stay this action is granted (Appendix C, *infra* at 25).

It seems incongruous that the court of appeals could have found anything in the record which would detract from the appealability of the court's order. Indeed, it was the lower court's presumption of appealability that formed the basis for the denial of the petitioner's request

for certification of the stay, as it assumed that certification would delay an appeal regarding the injunction:

> THE COURT: But to make it formal I now formally rule that the injunction which is requested by the Plaintiff in this case is denied.
>
> The Motion for Certification in my opinion is not warranted by this Court for two reasons, the main one being that I do not think that it is a proper matter to be certified. It is discretionary. I think I exercised my discretion and I don't think it would be looked upon favorably by the Circuit Court of Appeals. The second thing in my mind is that if you, the Plaintiff, decide to take this matter to the Circuit Court of Appeals on the denial by me of the injunctive relief which you request—
>
> MR. VEASEY: That is, the Plaintiff requested.
>
> THE COURT: Yes.—That would mean possible delay by granting the certification. There might be some delay in getting to what I consider to be the issue which you are anxious to have decided, namely, whether or not I should enjoin the Defendant in this case from proceeding in Venezuela. And these are the reasons that I am denying the Motion for Certification.
>
> As far as the injunctive relief and my reasons for acting as I have with respect to these two motions, I think that is pretty well documented in the proceedings before the Court in the Court's statements on May 11, the day of the hearing. Does that cover it?[2]

2. The motion for certification of that portion of the lower court's order dealing with the stay of the Delaware action was denied in an oral hearing on May 15, 1979. The above-quoted excerpt is taken from this oral hearing. It was during this hearing on May 15, 1979, that the district court judge announced his opinion concerning the injunctive and stay motions before the court. The transcript of this hearing is presented to this Court in Appendix D, *infra* at 27, 29-30.



*It is ironic that a presumption of appealability below actually had the effect of torpedoing all effective review of an unquestionably appealable order.* It is clearly not within the province of the court of appeals to ignore this record, and to invent its own rationale for the disposition of the injunction below.

It is one thing to be reminded that the grant or denial of a temporary injunction lies within the trial court's discretion and that it can be set aside only if an abuse of discretion can be shown. While these statements may have their proper place somewhere down the line in this litigation, it is quite another thing to deny jurisdiction to a litigant altogether. Section 1292(a) establishes the appealability of orders such as that presented herein. Accordingly, the petition should be granted to resolve the conflicts between the federal policy, statutes, and case law underlining the statute and the erroneous decision of the court of appeals below.

## II. Conflcts with Decisions of this Court and the Courts of Appeal

In speaking of section 1292(a), it has been stated that the statute must be approached gingerly, "lest a floodgate be opened that brings into the exception many pretrial orders." *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966). Accordingly, this Court and the courts of appeal have grappled with the proper scope of the term "injunction" under the statute. Recognizing that the "literal characterization of an order as an injunction only begins the inquiry into appealability", *Stateside Machinery Co. v. Alperin,* 526 F.2d 480, 482 (3d Cir. 1975), the courts have denied status

under 1292(a)(1) where appropriate. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 481-82 (1978); *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 182-84 (1955); *Morgantown v. Royal Insurance Co.*, 337 U.S. 254, 258 (1949).[3] But whatever interpretational problems this statute has spawned, this Court, and the courts of appeal, have uniformly recognized that orders respecting injunctions against the commencement or prosecution of litigation in other courts are appealable under § 1292(a). *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952), *aff'g*, 189 F.2d 31 (3d Cir. 1951); *Warshawsky & Co. v. Arcata National Corporation*, 552 F.2d 1257, 1258 (7th Cir. 1977); *National Equipment Rental, Ltd. v. Fowler*, 287 F.2d 43, 45 (2d Cir. 1961).[4] Indeed, so obvious was this fact that the court in *Alperin, supra*, noted such cases to be "classic form[s] of injunctive relief [within the meaning of § 1292(a)]."*Alperin, supra*, 526 F.2d at 483. The order issued by the Court of Appeals for the

3. *See, e.g.*, Rogers v. United States Steel Corporation, 541 F.2d 365 (3d Cir. 1976) (denial of class action status held not appealable as an injunction under § 1292(a)(1)); Stateside Machinery Co. v. Alperin, 526 F.2d 480 (3d Cir. 1975) (denial of motion to stay arbitration held not appealable pursuant to § 1292(a)(1)); Cotler v. Inter-County Orthopaedic Association, P.A., 526 F.2d 537, 541 (3d Cir. 1975) (motion to stay held not appealable). *See* Wallace v. Norman Industries, Inc., 467 F.2d 824, 826 (5th Cir. 1972); Ephrian Freightways, Inc. v. Red Ball Motor Freight, Inc., 376 F.2d 40, 41 (10th Cir. 1967).

4. *See, e.g.*, Codex Corp. v. Milgo Electronic Corp., 553 F.2d 735 (1st Cir.), *cert. denied*, 434 U.S. 860 (1977); Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577 (1st Cir. 1969); Maryland v. Atlantic Aviation Corp., 361 F.2d 873 (3d Cir. 1966), *cert. denied*, 385 U.S. 931 (1967); 9 MOORE'S FEDERAL PRACTICE § 110.2[1] at 235 (2d ed. 1975); 16 Wright & Miller, FEDERAL PRACTICE & PROCEDURE: *Jurisdiction* § 3924 at 67 (1st ed. 1973).



Third Circuit stands in stark, solitary conflict with these authorities.

By way of contrast, the courts have distinguished ordinary stays which merely regulate a court's docket from injunctive orders, which temporarily or permanently halt proceedings in other fora. *Compare Landis v. North American Co.*, 299 U.S. 248 (1936).[5] Because such orders were not thought to pose serious, perhaps irreparable consequences to litigants, but were in fact mere instances of docket regulation, injunctive status was denied. But these cases throw no light at all upon why there should have been such judicial abnegation as encountered below, as "mere regulation of the docket" cannot characterize the relief sought by Leeward in the Delaware District Court. Recognizing the difference between mere docket regulation and relief such as that sought by Leeward, this Court has noted that "[t]he point was made in the *Enelow* Case that power to stay mere steps within the framework of the litigation before a court differs as to appealability from an injunction prohibiting proceedings in another court." *Baltimore Contractors, supra*, at 183.[6]

5. In fact, it was the ordinary stay, as opposed to the injunction, that presented problems of construction. *See Baltimore Contractors v. Bodinger*, 348 U.S. 176, 182 (1955), where this Court noted: "The appealability of routine interlocutory injunctive orders raised few questions. There the statute was clear. I was when stays of proceedings, in distinction to injunctions, were appealed that the issue of jurisdiction became sharp." *Id.* [citation omitted].

6. *Enelow v. New York Life Insurance Co.*, 293 U.S. 379 (1935), dealt with the appealability of a stay order pursuant to section 129 of the Judicial Code, which was the predecessor of section 1292(a). Further interpretation of the *Enelow-Ettelsen* rule, which rests on the distinction between "legal" and "equitable" claims, is not in issue herein. *See generally* Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942). The *Enelow* decision did, however, note the

In speaking of section 1292, this Court has said, "[the statute] allows appeals also from certain interlocutory orders, decrees and judgments, . . . [and it] indicate[s] the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties." *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, 545 (1949). The order entered by the Delaware District Court meets these requirements. This much must be conceded, as a refusal to enjoin the Declaratory Judgment Action in Venezuela is not conditional, nor can it be effectively subject to alteration or amendment prior to final judgment in Venezuela.[7] Moreover, although perhaps reviewable after judgment on the merits, reviewability after judgment serves no protection against the relief sought as the duplication of effort and waste of judicial time and litigants' money is precisely the evil the injunctive relief in such circumstances seeks to avoid.[8] Accordingly, the decision of the court of appeals below denying subject-matter jurisdiction directly conflicts with decisions in this Court and in the

distinction between ordinary stays of a court's own proceedings which may issue "to control the progress of the cause" and the power to interfere with proceedings in another court, which should be deemed a "grant or refusal of an injunction within the meaning of § 129 [now § 1292(a)(1)]." 293 U.S. 379, 381-82.

7. Recently this Court has distinguished orders which are subject to alteration prior to final judgment as not appealable as not presenting such "final and irreparable" effect so as to come within an exception to the final judgment rule of section 1291. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). *Compare* 28 U.S.C. § 1291 (1979).

8. *See Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197, 1201 (2d Cir. 1970), where the Court stated that it would be "absurd" under such circumstances to defer determination of the propriety of an order identical to that herein until after judgment. *Compare* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).



court of appeals, and a writ should issue to resolve these conflicts.

### III. Conflicts with Decisions in the Courts of Appeal Holding that Orders Disposing of a Motion to Stay and a Motion to Enjoin Proceedings in Other Courts are Appealable as One Related Venue Question.

There can be no doubt that where duplication of issues and concurrent litigation are present, a Motion to Stay one action, when combined with a Motion to enjoin another, will form a single, related venue question. The courts of appeal have so recognized this fact, noting that the entire venue question is appealable, the injunction pursuant to § 1292(a), and the stay, where applicable, as ancillary to the grant or denial of the injunction. *Mercury Motor Express, Inc. v. Brinke,* 475 F.2d 1086, 1092 (5th Cir. 1973); *Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197, 1201 (2d Cir. 1970). To ferret out an ordinarily nonappealable portion of a district court's order, while ignoring another appealable aspect presumably to lessen the court's docket load, is a practice destructive to a litigant's right of review and the federal policy underlying section 1292(a). *See Codex Corporation v. Milgo Electronic Corporation,* 553 F.2d 735 (1st Cir. 1977) *cert. denied,* 434 U.S. 860 (1977).

In *Codex,* a motion to enjoin duplicitous litigation and a Motion to Stay were before the Court. The order entered by the District Court was a stay of a later filed declaratory judgment action. No mention of the injunction was made in the order; rather, the Court of Appeals held that the motion to enjoin must be deemed denied by the

stay, *sub silentio*. On such facts, the court held that an appeal would lie *"as [a matter] of right."* Id. at 737 (emphasis added). The only question, according to the Court, was whether the motion to enjoin was somehow dispensed with by the Court. *See, e.g., Carter v. American Telephone & Telegraph Co.*, 365 F.2d 486, 489 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967) (noting that appealability is particularly clear if the district court makes it perfectly clear that the stay was the reason for denying preliminary injunctive relief); 16 WRIGHT & MILLER § 3923 at 66 (1st ed. 1973). "It is the denial of a preliminary injunction, not the validity of the reasons therefore, which triggers the interlocutory appeal as a matter of right under § 1292(a)(1)." *Carter, supra*, at 489. This analysis should have been applied below. Accordingly, a writ should issue to resolve these conflicts in the courts of appeal.

## CONCLUSION

In view of the conflict of the dismissal below with the prior and long standing decisions and rule of this court and the various courts of appeals, and particularly in light of the specific mandate of § 1292(a)(1), Petitioners respectfully pray that this Court grant a Writ of Certiorari and reverse the decision of the court below.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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NO. 79-_____

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LEEWARD PETROLEUM, LTD.,
A Bermuda Corporation,
*Petitioner*

v.

MENE GRANDE OIL COMPANY,
A Delaware Corporation, and
GULF OIL CORPORATION,
A Pennsylvania Corporation,
*Respondents*

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**APPENDIX TO**
**PETITION FOR A WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-245

LEEWARD PETROLEUM, LIMITED,
a Bermuda corporation,
Plaintiff,

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL CORPORATION,
a Pennsylvania corporation,
Defendants.

MOTIONS TO SEVER, FOR PARTIAL SUMMARY JUDGMENT, AND TO DISMISS OR STAY ON GROUNDS OF *FORUM NON CONVENIENS*

Defendants Mene Grande Oil Company ("Meneg") and Gulf Oil Corporation ("Gulf") hereby move as follows:

1. Pursuant to Rule 21, Fed. R. Civ. P., to sever Count VI of the Amended Complaint;

2. Pursuant to Rule 56, Fed. R. Civ. P., for summary judgment dismissing Count VI on the ground that, based upon the pleadings, answers to interrogatories, depositions and affidavits to be filed, there is no material issue of fact as to such Count and that defendants are entitled to judgment as a matter of law; and,



3. To bring on for hearing the motion of Meneg to dismiss, or alternatively to stay, Counts I through V of the Amended Complaint on grounds of *forum non conveniens.*

In support of the foregoing, defendants respectfully represent as follows:

A. On September 19, 1975, defendants moved to dismiss the original complaint for failure to state a claim upon which relief can be granted, pursuant to Rule 12 (b)(6), Fed. R. Civ. P., and Meneg further moved to dismiss or stay this action on grounds of *forum non conveniens.* (Docket No. 5).

B. On November 6, 1976, following the filing of defendants' brief in support of the motion to dismiss under Rule 12(b)(6), plaintiff filed an amended complaint. (Docket No. 18). Defendants again moved to dismiss the amended complaint under Rule 12(b)(6), and Meneg again moved to dismiss or alternatively to stay this action on grounds of *forum non conveniens.* (Docket No. 21). On December 4, 1975, the Court entered an order requiring the Rule 12(b)(6) motion to be briefed and argued, and deferring the briefing and argument on the motion of Meneg to dismiss or alternatively to stay on grounds of *forum non conveniens* pending disposition of the Rule 12(b)(6) motion. (Docket No. 22).

C. On May 25, 1976, The Court rendered an opinion and on July 6, 1976 entered an order denying the Rule 12(b)(6) motion to dismiss. (Docket Nos. 31 and 37, respectively). Thereafter the defendants filed their answer to the amended complaint. (Docket No. 42).

D. In their answer to the amended complaint the defendants asserted, *inter alia,* the defense of *forum non conveniens,* in paragraph 70 as follows:

> "70. The Amended Complaint should be dismissed under the doctrine of *Forum Non Conveniens* and Plaintiff remitted to pursue its available remedies under the laws of and in the Courts of Venezuela on the ground that the alleged transaction and all allegations as set forth in Counts I through V of the Amended Complaint: (a) involve parties and persons situate in Venezuela and crude oil produced and to be sold and purchased in Venezuela; (b) involve alleged obligations arising under and to be interpreted and governed exclusively by the laws of Venezuela; (c) involve alleged claims which are properly determinable exclusively by the Courts of the Republic of Venezuela; and/or (d) involve alleged claims which should, as a matter of comity, be determined by such Courts."

E. Defendants submit that there is no material issue of fact and that they are entitled to judgment as a matter of law on Count VI, in that there is no factual or legal basis for plaintiff's claim based upon an alleged violation of the federal antitrust laws.

F. It is appropriate in this case for the Court to sever and proceed separately with Count VI of the amended complaint and to decide the defendants' motion for summary judgment as to such claim.

G. The remainder of the amended complaint should be dismissed or stayed under the doctrine of *forum non conveniens,* in that such claims are wholly dependent upon issues arising under and required to be interpreted



and governed exclusively by the laws of Venezuela and that such issues are properly determinable by the Courts of the Republic of Venezuela.

Respectfully submitted,

/s/ E. NORMAN VEASEY
E. Norman Veasey

/s/ RICHARD J. ABRAMS
Richard J. Abrams
Richards, Layton & Finger
4072 DuPont Building
Wilmington, Delaware 19899
Attorneys for Defendants
Mene Grande Oil Company
and Gulf Oil Corporation

Dated: September 6, 1977

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 75-245

LEEWARD PETROLEUM, LTD.,
a Bermuda corporation,
Plaintiff

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL COMPANY,
a Pennsylvania corporation,
Defendants

### MOTION TO ENJOIN DEFENDANT, MENE GRANDE OIL COMPANY, FROM PROCEEDING IN ACTION SUBSEQUENTLY FILED IN VENEZUELA

Plaintiff, Leeward Petroleum, Ltd., (Leeward) moves this Court for an order enjoining the defendant, Mene Grande Oil Company, (Meneg) from taking any further action or conducting any further proceedings in the declaratory judgment action filed by Meneg in the Judicial Circuit of the Federal District and State of Miranda in the Country of Venezuela, Case No. 8025, filed on or about September 6, 1977. The grounds for this motion are:

1. Both Leeward and Meneg are parties in the action now pending in this Court and have been since August,



1975, or over two years before Meneg filed its Venezuelan action.

2. The factual and legal issues raised in the latter filed action are included within Count I of the present action towards trial of which considerable time, effort and expense have already been made in this action.

3. The said issues can be fully litigated in this forum whereas all of the said issues raised in this action cannot be fully litigated in the foreign forum.

4. The subsequently filed proceedings are vexatious and oppressive.

5. Said subsequent foreign proceedings were filed in derogation of this Court's jurisdiction and seek an ouster thereof.

The factual and legal basis substantiating the grounds set forth above are more fully set out in plaintiff's opening brief, which is being filed concurrently, herewith.

Dated: August 7, 1978

Respectfully submitted,

Connolly, Bove & Lodge

By /s/ THOMAS S. LODGE
Attorneys for Plaintiff
Farmers Bank Building
Wilmington, Delaware 19899

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-245

LEEWARD PETROLEUM, LTD.,
a Bermuda corporation,
Plaintiff,

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL CORPORATION,
a Pennsylvania corporation,
Defendants.

### ORDER

THIS 15th day of May, 1979, the parties having brought the following motions before the Court:

(a) The motion of defendants Mene Grande Oil Company ("Meneg") and Gulf Oil Corporation ("Gulf") to stay this action pending final determination of an action commenced by Meneg against plaintiff Leeward Petroleum, Ltd. ("Leeward") now pending in the Second Court of First Instance for Commercial Matters of the Judicial District for the Federal District and the State of Miranda, File No. 4995 (the "Venezuelan Action");

(b) The motion of Leeward to enjoin Meneg from proceeding in the Venezuelan Action; and



(c) The motion of Meneg and Gulf for summary judgment dismissing Count VI of the Amended Complaint;

and such motions having come before the Court for decision on the record herein and the briefs and oral argument of the parties, and the Court having exercised its discretion and having rendered its decision in open Court on May 11, 1979, it is

ORDERED as follows:

1. The Motion of Leeward to enjoin Meneg from proceeding in the Venezuelan Action is denied without prejudice.

2. The Motion of Meneg and Gulf to stay this action is granted. This action and all proceedings herein shall be stayed pending final determination in the Venezuelan Courts of the issues raised by way of Declaratory Judgment in the Venezuelan Action, or until further Order of this Court, on the condition that Gulf consent that, for purposes of the action pending in this Court, it shall be bound by such determination of the Venezuelan Action and that as to Gulf such judgment shall be given such *res judicata* and collateral estoppel effect as shall be applicable to Meneg and Leeward as if Gulf were a party to the Venezuelan Action.

3. The motion of Meneg and Gulf for summary judgment dismissing Count VI is denied without prejudice.

/s/ CALEB M. WRIGHT
Senior Judge

Approved as to form:

/s/ THOMAS S. LODGE
Thomas S. Lodge
Connolly, Bove & Lodge
1800 Farmers Bank Building
Wilmington, DE 19801
Attorney for Plaintiff

/s/ E. NORMAN VEASEY
E. Norman Veasey
Richards, Layton & Finger
4072 DuPont Building
Wilmington, DE 19801
Attorney for Defendants

On behalf of Gulf Oil Corporation I do hereby accept and consent to the terms and conditions of paragraph 2 of this Order and I represent to the Court that Gulf intends and agrees to be bound thereby.

/s/ E. NORMAN VEASEY
E. Norman Veasey
Attorney for Gulf Oil Corporation



## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-245

LEEWARD PETROLEUM, Ltd.,
a Bermuda corporation,
Plaintiff,

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL CORPORATION,
a Pennsylvania corporation,
Defendants.

---

Wilmington, Delaware
May 15, 1979

BEFORE: THE HONORABLE CALEB M. WRIGHT,
Senior, Judge, United States District Court.

APPEARANCES:

CONNOLLY, BOVE & LODGE
By: THOMAS S. LODGE, ESQ.
for the Plaintiff,

RICHARDS, LAYTON & FINGER
By: E. NORMAN VEASEY, ESQ.
for the Defendants.

---

TRANSCRIPT OF PROCEEDINGS

---

May 15, 1979
5:05 o'clock p.m.
Judge's Chambers

PRESENT: As noted.

---

THE COURT: Gentlemen, there are several matters which you have asked me to rule upon. I am sorry that I don't have the time to do this more formally. But would you please state for the record what it is you wish me to rule upon?

MR. VEASEY: Your Honor, I have submitted a form of order to implement the Court's ruling of Friday, May 11. The form of order has been agreed to, I believe, by Mr. Lodge. In addition to that, I believe Mr. Lodge has an application for certification to the Court of Appeals.

We take the view that the order as agreed to by the parties to implement Your Honor's ruling is not appealable under 28 USC, Section 1292 (a)(1), nor should it be certified under 28 USC, Section 1292 (b) for the reason set forth in the letter which I have submitted to Your Honor today.

Therefore, it would be our application that the request for certification be denied. This is a discretionary ruling of Your Honor's. The Order so states. The basis for the ruling is set forth in the record.

THE COURT: Mr. Lodge, do you have anything that you wish to put on the record?



MR. LODGE: Your Honor, of course—

THE COURT: With respect to the certification.

MR. LODGE: With respect to the certification, the application was made on the ground that the granting of the stay in the court pending the determination of the declaratory judgment action in the Venezuelan court, and the denial of the injunction to enjoin defendant from proceeding in the Venezuelan court, are so interwoven that it is Plaintiff's contention that if the matter were certified to the Court of Appeals, that is, the matter of the stay going up with the injunction, which, of course, we take the position, as opposed to Mr. Veasey, that the denial of the injunction is an appealable order under 1292 (a)(1), that it would tie the package up in one bundle as it were and in our opinion materially advance the termination of the litigation, not to have this legal battle being waged on two fronts simultaneously.

THE COURT: Very well. Now, the question of the stay was litigated, and, of course, I did not make any formal ruling when we had our hearing, when was it, last Friday.

MR. VEASEY: Last Friday, May the 11th.

THE COURT: Friday, May the 11th about the motion for the injunctive relief. I thought that the very fact that I stayed this action here indicated that the matter down there should proceed. But to make it formal I now formally rule that the injunction which is requested by the Plaintiff in this case is denied.

The motion for certification in my opinion is not warranted by this Court for two reasons, the main one being

that I do not think that it is a proper matter to be certified. It is discretionary. I think I exercised my discretion and I don't think it would be looked upon favorably by the Circuit Court of Appeals. The second thing in my mind is that if you, the Plaintiff, decide to take this matter to the Circuit Court of Appeals on the denial by me of the injunctive relief which you requested—

MR. VEASEY: That is, the Plaintiff requested.

THE COURT: Yes.—that that would mean possibly delay by granting the certification. There might be some delay in getting to what I consider to be the issue which you are anxious to have decided, namely, whether or not I should enjoin the Defendants in this case from proceeding in Venezuela. And these are the reasons that I am denying the motion for certification.

As far as the injunctive relief and my reasons for acting as I have with respect to these two motions, I think that is pretty well documented in the proceedings before the Court and the Court's statements on May the 11th, the day of the hearing. Does that cover it?

MR. VEASEY: Yes, Your Honor. I would just like to add one thing with respect to the matter of delay. I agree with Your Honor that certification and injunction pending appeal would delay matters.

THE COURT: It might.

MR. VEASEY: It might delay matters.

THE COURT: I don't know that it would, but I can see the possibility that it might delay matters.

MR. VEASEY: It is our view, and I think the record supports it, that the action in Venezuela can go forward,



we're ready to go forward on the merits of that action, and, if the Plaintiff here, Leeward, would cooperate, the matters could go forward on the merits down there expeditiously. We're prepared to move that forward.

THE COURT: Now, off the record a minute.

(A brief discussion was had off the record.)

MR. LODGE: In reply to Mr. Veasey's statement, I would not want any inference to be drawn from the fact that Leeward will not cooperate in the prosecution of the declaratory judgment action in Venezuela—I certainly assume that it will—and that there should be no feeling that there would be any intentional foot dragging in order to try to get the matter determined here in the Court of Appeals before anything further is done in Venezuela.

(The proceedings recessed at 5:20 o'clock p.m.)

---

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-245

LEEWARD PETROLEUM LIMITED,
a Bermuda corporation,
Plaintiff,

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL CORPORATION,
a Pennsylvania corporation,
Defendants.

### NOTICE OF APPEAL

Notice is hereby given that Leeward Petroleum, Ltd., plaintiff above-named, hereby appeals to the United States Court of Appeals for the Third Circuit from paragraph 1 of the Order, entered by the United States District Court for the District of Delaware on May 15, 1979, denying plaintiff's Motion to enjoin the defendant, Mene Grande Oil Company, from proceeding in the Venezuelan Action begun by said defendant against plaintiff; and also from paragraph 2 of said Order granting the Motion of defendants to stay the instant action pending the final determination of the issues raised by Declaratory Judgment in



the Venezuelan Action, or until further Order of this Court.

Dated: June 11, 1979

Connolly, Bove & Lodge

By /s/ THOMAS S. LODGE
Farmers Bank Building
Wilmington, Delaware 19899
Attorneys for Plaintiff

OF COUNSEL:

George W. Renaudin, Esq.
Royston, Rayzor, Cook & Wickery
3710 One Shell Plaza
Houston, Texas 77002

## APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1947

LEEWARD PETROLEUM, LTD.,
a Bermuda corporation,
Appellant,

v.

MENE GRANDE OIL COMPANY,
a Delaware corporation, and
GULF OIL CORPORATION,
a Pennsylvania corporation,
Appellees.

### APPELLEES' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant-Appellees, Mene Grande Oil Company and Gulf Oil Corporation, hereby respectfully move this Court for an Order dismissing the appeal of plaintiff-appellant, Leeward Petroleum, Ltd. to this Court from an Order of the United States District Court for the District of Delaware, entered May 15, 1979.

The ground upon which this Motion is based is that this Court does not have subject matter jurisdiction under 28 U.S.C. § 1292(a)(1) over an appeal from an interlocutory order of the District Court: (a) staying proceedings before it in favor of a declaratory judgment action in the courts of Venezuela; and (b) refusing to



enjoin the prosecution of the declaratory judgment action in Venezuela. Support for this Motion is found in appellees' answering brief filed September 6, 1979, at pages 11 et. seq.

WHEREFORE, appellees respectfully move this Court to dismiss the appeal herein for lack of subject matter jurisdiction, the costs to be awarded to appellees.

Respectfully submitted,

/s/ E. NORMAN VEASEY
E. Norman Veasey
Allen M. Terrell, Jr.
David B. Stratton
Richards, Layton & Finger
4072 DuPont Building
P. O. Box 551
Wilmington, Delaware 19899
Attorneys for Defendant-
Appellees, Mene Grande Oil
Company and Gulf Oil
Corporation

OF COUNSEL:

Kevin F. Cunningham
The Law Department
The Gulf Companies
P. O. Box 3725
Houston, Texas 77001

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 1979, that true and correct copies of the within Appellees' Motion to Dismiss for Lack of Subject Matter Jurisdiction were personally delivered to:

Thomas S. Lodge, Esquire
Connolly, Bove & Lodge
1800 Farmers Bank Building
Wilmington, Delaware 19899
Counsel for Appellant,
Leeward Petroleum, Ltd.

/s/ E. NORMAN VEASEY
E. Norman Veasey

Dated: September 6, 1979



**APPENDIX G**

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
For The Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia 19106

THOMAS F. QUINN
Clerk

Telephone
215-597-2995

November 6, 1979

Mr. William S. Anderson, Jr.
Clerk, U. S. District Court
Box 18 Federal Building
Wilmington, Delaware 19801

Re: Leeward Petroleum, Limited vs. Mene Grande Oil Company, et al.; Leeward Petroleum Limited, etc., Appellant — No. 79-1947
(D.C. Civil No. 75-0245)

Dear Sir:

Enclosed herewith is a certified copy of order in the above-entitled case(s). This certified order is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

We return herewith the record in this case and will appreciate your signing the enclosed list(s) as a receipt for same.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified order is also enclosed showing costs taxed, if any.

Very truly yours,

/s/ THOMAS F. QUINN
Clerk

lmp
Enclosure

cc: Thomas S. Lodge, Esq.
(E. Norman Veasey, Esq.
(Allen M. Terrell, Jr., Esq.



THIRD CIRCUIT

October 5, 1979

No. 79-1947

LEEWARD PETROLEUM, LIMITED

v.

MENE GRANDE OIL COMPANY
and
GULF OIL CORPORATION

LEEWARD PETROLEUM LIMITED, a Bermuda corporation, Appellant

(D. C. Civil No. 75-0245)

Present: GIBBONS and HIGGINBOTHAM, *Circuit Judges.*

1. Appellees' motion to dismiss appeal for lack of jurisdiction, the costs to be awarded to appellees,
2. Copy of brief for appellees, sent by the undersigned for the Court's information,

in the above listed for Monday, October 15, 1979, or as the Court decides.

Respectfully,

/s/ T. L. QUINN
Clerk

ald
enc.

The foregoing Motion is granted.

By the Court,

/s/ JOHN J. GIBBONS
Judge

Costs taxed in favor of appellees as follows:

Brief . . . . . $1,810.09

Dated: October 15, 1979

Certified as a true copy and issued in lieu of a formal mandate on November 6, 1979.

Test: /s/ THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Supreme Court, U.S.
FILED
FEB 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1979.

## No. 79-1087.

LEEWARD PETROLEUM, LTD., a Bermuda Corporation,
*Petitioner,*

*v.*

MENE GRANDE OIL COMPANY, a Delaware Corporation, and GULF OIL CORPORATION, a Pennsylvania Corporation,
*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

E. NORMAN VEASEY,
ALLEN M. TERRELL, JR.,
DAVID B. STRATTON,
RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
P. O. Box 551,
Wilmington, DE 19899

*Attorneys for Respondents Mene Grande Oil Company and Gulf Oil Corporation.*

*Of Counsel:*
KEVIN F. CUNNINGHAM,
The Law Department,
The Gulf Companies,
P. O. Box 3725,
Houston, Texas. 77001

Dated: February 13, 1980

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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IN THE

# Supreme Court of the United States

October Term, 1979.

No. 79-1087.

LEEWARD PETROLEUM, LTD.,
a Bermuda corporation,

Petitioner,

*v.*

MENE GRANDE OIL COMPANY, a Delaware corporation, and GULF OIL CORPORATION, a Pennsylvania corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### OPINION BELOW

The United States Court of Appeals for the Third Circuit (the "Court of Appeals") entered an order without opinion dismissing the interlocutory appeal attempted by Petitioner, Leeward Petroleum Ltd., a Bermuda corporation (sometimes referred to as "Leeward" or "Petitioner"), plaintiff in the United States District Court for

the District of Delaware (the "District Court"). Mene Grande Oil Company, a Delaware corporation ("Meneg") and Gulf Oil Corporation, a Pennsylvania corporation ("Gulf"), defendants in the District Court, moved to dismiss the appeal in the Court of Appeals.

The Court of Appeals dismissed the appeal for lack of jurisdiction over Petitioner's appeal of the interlocutory order of the District Court. The interlocutory order, entered in the exercise of the District Court's dicretion, temporarily stayed the action in the District Court pending final determination of a declaratory judgment action in the courts of the Republic of Venezuela (the "Venezuelan action"). The interlocutory order also denied without prejudice Leeward's motion to enjoin Meneg from proceeding in the Venezuelan action, which motion was filed nearly a year after commencement of the Venezuelan action and after Meneg and Gulf moved to dismiss or stay the District Court action.[1]

## JURISDICTION

Jurisdiction of this Court is purportedly invoked under 28 U. S. C. § 1254(1). Since the petition merely attacks the dismissal of an appeal of an interlocutory order, there is actually no case in the Court of Appeals to which certiorari can be granted.

## STATUTE INVOLVED

The Petition claims that this Court should review the dismissal of an interlocutory appeal because the Court of Appeals was powerless to so dismiss and was required to accept jurisdiction by reason of 28 U. S. C. § 1292(a)(1). Respondents deny that the statute grants jurisdiction to review the District Court's interlocutory order.

1. Appendix G and C, respectively, to the Petition for a Writ of Certiorari, hereinafter cited as "PB" followed by page references.



## QUESTION PRESENTED

Whether or not this Court should grant certiorari to the Court of Appeals to review its order dismissing for lack of jurisdiction an appeal of an interlocutory order of the District Court staying temporarily proceedings in that court pending determination of a declaratory judgment action in the courts of the Republic of Venezuela and, thereby, denying Petitioner's ancillary and subsequently filed motion to enjoin proceedings in the Venezuelan action.

## COUNTERSTATEMENT OF THE CASE

This is a civil action for alleged breach of contract and related claims which action arises out of negotiations in Venezuela for the sale of Venezuelan crude oil by Meneg to Leeward. (2a).[2] Meneg and Gulf deny Leeward's claims, including the existence of any contract, and submit, among other defenses, that the approval of the sale by the Venezuelan Ministry of Mines and Hydrocarbons was required and refused. (14a, 26a).

Defendants have contended throughout the litigation that only the Venezuelan courts should decide the matter since important issues of Venezuelan Hydrocarbon law lie at the root of the entire controversy. (19a). These issues are matters of *Orden Publico* (i.e. matters affecting the vital national interests of Venezuela) and should be decided only by the Venezuelan Courts. Accordingly, Meneg instituted a declaratory judgment action in Venezuela requesting a ruling on the following threshold question of

2. References to the appendix which was filed by Leeward in the Court of Appeals, and which is part of the record in that court, will be designated in parenthesis with a page number followed by the letter "a", e.g. "(2a)." References to the record in the District Court, which has been returned to that court with the Court of Appeals' mandate, will be designated as "Docket No. ___."

Venezuelan law: Did the transaction require Venezuelan government approval and, if so, did the refusal of that approval vitiate any alleged contract? Meneg and Gulf then sought a stay in the District Court pending that determination. (28a).

Leeward did not immediately move in the District Court to enjoin Meneg from proceeding in Venezuela, electing instead to litigate in the Venezuelan forum by filing a series of dilatory motions including a *lis pendens* motion in which Leeward asked the Venezuelan Court to dismiss that action because of the prior pendency of the action in the District Court. (61a, 70a, 80a). Nearly a year after the Venezuelan action was commenced and the motion to stay was filed in the District Court, Leeward filed a motion to enjoin Meneg from proceeding in Venezuela. (31a, 67a).

The Venezuelan Court, in a scholarly and comprehensive opinion, denied Leeward's *lis pendens* motion, holding that the threshold questions of Venezuelan Hydrocarbons law governing this controversy were matters of *Orden Publico* and are matters which are vital and sensitive to the interests of the Republic of Venezuela. The Venezuelan Court expressly held that *only* the Venezuelan courts should decide them. (74a-88a).

After thorough briefing by the parties and after argument on May 11, 1979, the District Court exercised its discretion by provisionally granting the motion to stay pending the outcome of the Venezuelan proceeding. (89a *et seq.*). This ruling was followed by an office conference on May 15, 1979, at which the Court was asked by Leeward to rule on its later filed ancillary motion to enjoin and to certify the stay order to the Court of Appeals. On that date the interlocutory order was entered and the trial judge denied Leeward's motion to certify. (163a-167a).



Leeward's Petition is misleading in describing these events. The procedural context of the motions before the District Court was thoroughly briefed in the Court of Appeals [3] and apparently demonstrated to the satisfaction of that Court the bases for Respondents' motion to dismiss the appeal. The Court of Appeals could determine from the entire context of the proceedings in the District Court, including the 73 page transcript of the May 11, 1979 hearing, the nature of the interlocutory order and the factors considered by the District Court. These factors are set forth in detail [4] in the record before the Court of Appeals. This record demonstrates, therefore, that the central issue in the District Court was a discretionary stay and Leeward's motion to enjoin was an afterthought to attempt to bootstrap an appeal. The Court of Appeals properly found it had no jurisdiction and dismissed the appeal.

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3. Brief For Defendants-Appellees Mene Grande Oil Company and Gulf Oil Corporation (Docket No. 4) in the Court of Appeals ("Respondents' Brief below").

4. Respondents' Brief below (at 17-19) contained a detailed summary of the discretionary factors involved in the District Court's decision. These need not be repeated here except to note that the District Court did not regard the Venezuelan action as duplicative; rather, that action was in aid of the District Court on fundamental matters of Venezuelan law which were best determined by the Venezuelan Court initially before proceeding further in the District Court. Since these issues were matters of *Orden Publico*, they were not mere matters of Venezuelan law which could be proved in the District Court. The Venezuelan Court had already ruled on the question and held that *only* the Venezuelan Courts should decide the threshold issues. When it is appropriate to lift the stay in the District Court the final decision of the Venezuelan Court would have an important bearing on the outcome. *Id.*

## ARGUMENT

### The Court of Appeals Has Not Decided an Important Question of Federal Law Which Should Be Settled by This Court and the Decision Is Not in Conflict With the Decision of Another Court of Appeals in the Same Matter

The decision below did not decide an important question of federal law which has not been, but should be, settled by this Court. Supreme Court Rule 19(1)(b). For Leeward to suggest otherwise is ludicrous. Respondents submit that the result below is consistent with this Court's interpretation of 28 U. S. C. § 1292(a)(1).

The statutory grant of jurisdiction over interlocutory injunction orders was intended to prevent a party's incurring a serious and perhaps irreparable injury if it were required to await the final disposition of the case before taking an appeal from the District Court's order concerning injunctive relief. *Baltimore Contractors, Inc. v. Bodinger*, 348 U. S. 176, 181 (1955); 26 Stat. 826 § 7 (1891) as amended 28 Stat. 666; 31 Stat. 660 (1900); Judicial Code of 1911, 36 Stat. 1087, 1137 as amended 43 Stat. 937 (1925); 28 U. S. C. (1940 Ed.) §§ 225(b), 227, 227A. This case does not involve any substantive injury to Leeward and lack of jurisdiction over its appeal will result in no irreparable injury. While Leeward futilely argues its alleged injury, the argument is demonstrably hollow when examined in light of the purpose of the statute.

Leeward suggests that merely because it moved to enjoin proceedings in Venezuela—one year after Respondents had filed in Venezuela and moved for a stay in the District Court—the Court of Appeals must accept jurisdiction over its interlocutory appeal. Leeward's motion was not related to the merits of its action. Leeward relates how its motion



to enjoin was denied (PB, 10), how denial of its motion to enjoin means it must await the outcome of the Declaratory Judgment Action in Venezuela (PB, 14), and how courts treat motions to stay in one forum and to enjoin in another forum as a single venue question (PB, 15). Even if Petitioner's points were valid—which respondents of course deny—the factors appropriate for granting certiorari under Supreme Court Rule 19 simply are not present in the case at bar.

Petitioner acknowledges that § 1292(a)(1) is a limited exception to the "ordinary rule" that interlocutory orders are not appealable (PB, 8-9). It cites the decisions of this Court narrowly construing § 1292(a)(1). *Cf., Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 (1972) (PB, 8) (dicta in decision holding interlocutory class action order appealable as final, collateral order); *Baltimore Contractors, Inc. v. Bodinger*, 348 U. S. 176 (1955) (PB, 8, 12) (a trial court's refusal to stay equitable proceedings pending arbitration is not appealable); *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U. S. 23 (1966) (PB, 11) (denial of a motion for summary judgment because of the presence of unresolved issues of fact is not appealable); *Gardner v. Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978) (PB, 12) (an interlocutory order denying class certification in an action for injunctive relief is not appealable under § 1292(a)(1)); *Morgantown v. Royal Insurance Co.*, 337 U. S. 254 (1949) (PB, 12) (a denial of a demand for a jury trial is not appealable; also distinguishing two earlier cases cited by Petitioner: *Enelow v. New York Life Insurance Co.*, 293 U. S. 379 (1935) and *Ettelson v. Metropolitan Life Insurance Co.*, 317 U. S. 188 (1942) (PB, 13)); and *Cohen v. Beneficial Industrial Loan Corporation*, 337 U. S. 541 (1949) (PB, 14) (dicta in decision finding refusal to require plaintiff to provide bond as prerequisite to maintaining derivative suit to be an appealable

collateral order; but see the Court's subsequent rejection of the "death knell" doctrine as a test of whether or not an interlocutory order is appealable as a final order in *Coopers & Lybrand v. Livesay*, 437 U. S. 463 (1978) (PB, 14)).

Respondents submit that the decision below is consistent with this Court's well-settled interpretation of § 1292 (a)(1). Petitioner apparently concedes the clarity of this Court's interpretation of the statute, but suggests something unique in the trial court's treatment of the motions.

Petitioner's theory here seems to be that if a trial judge presumed his interlocutory decision to be appealable, it is necessarily appealable (PB, 9-11). First, we do not read the record as suggesting that the trial judge felt that his interlocutory order was necessarily appealable. Even if he did, so what? It is for the Court of Appeals to determine whether the trial court's interlocutory order is appealable. The trial judge's role is limited to determining whether to grant a motion to certify his opinion. Here the District Court's denial of Petitioner's motion to certify cannot be bootstrapped into the basis for petitioner's claim that the Court of Appeals had to take jurisdiction of its interlocutory appeal (PB, 11).

Second, the trial judge's deliberations evidence the discretionary nature of his ruling, in which denial of the Petitioner's motion to enjoin was only ancillary to the judge's basic decision to stay temporarily proceedings in the District Court:

> "The Court: Very well. Now, the question of the stay was litigated, and, of course, I did not make any formal ruling when we had our hearing . . . Friday, May the 11th about the motion for the injunctive relief. *I thought that the very fact that I stayed this action here indicated that the matter down there should proceed.* But to make it formal I now formally rule that the injunction which is requested by the Plaintiff in this case is denied." (PB, 29). (Emphasis added).



The rulings in the District Court of which petitioner sought review by the Court of Appeals are discretionary. This Court has restrained itself from reviewing such discretionary rulings. *Landis v. North American Co.*, 299 U. S. 248 (1936) (PB, 13); and *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952) (PB, 12): [5]

> "Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts." *Id.*, at 183-184.

An order which merely continues the case and does not reach the merits of the substantive claim is nothing more than a step in processing the action. The grant of a motion to stay and, as a corollary, the denial of a later filed motion to enjoin proceedings in the other forum, does not constitute a denial of an injunction for purposes of appeal under 28 U. S. C. § 1292(a)(1). *Rodgers v. United States Steel Corp.*, 541 F. 2d 365, 373 (3d Cir. 1976) (PB, 12); *Cotler v. Inter-County Orthopaedic As-*

5. Petitioner apparently misreads *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, as involving an issue under § 1292(a). Rather, this Court granted certiorari because the issues involved important questions as to the conduct of multiple litigation in the federal judicial system. *Id.*, 183. By contrast, the case at bar does not involve multiple federal court litigation.

*sociation, P. A.*, 526 F. 2d 537, 540 (3d Cir. 1975) (PB, 12); and *Stateside Machinery Co. v. Alperin*, 526 F. 2d 480, 42 (3d Cir. 1975) (PB, 12). The order of the Court of Appeals is consistent with these cases in the Third Circuit.

Furthermore, there is no conflict between the decision below and those of another court of appeals on the same matter. The Petitioner points to no other decision involving a set of circumstances similar to that passed upon by the District Court in ruling upon Respondents' motion to stay proceedings before it pending the outcome of a Venezuelan declaratory judgment action to determine certain "threshold" issues on the Venezuelan contract claims.

Petitioner's citations to decisions in other courts of appeals do not demonstrate a conflict among the courts of appeals. The cases fall within two consistent categories: (a) nonappealable interlocutory orders involving motions to stay; *see, e.g., Ephraim Freightways, Inc. v. Red Ball Motor Freight, Inc.*, 376 F. 2d 40 (10th Cir. 1967), *cert. denied*, 389 U. S. 829 (1967) (PB, 12) and *Wallace v. Norman Industries, Inc.*, 467 F.2d 824 (5th Cir. 1972) (PB, 12); and (b) cases where the interlocutory order directly or indirectly affected the merits of the case; *Canadian Filters (Harwich) v. Lear-Siegler, Inc.*, 412 F. 2d 577 (1st Cir. 1969) (PB, 12), *Carter v. American Telephone & Telegraph Co.*, 365 F. 2d 486 (5th Cir. 1966), *cert. denied*, 385 U. S. 1008 (1967) (PB, 16); *Codex Corporation v. Milgo Electronic Corp.*, 553 F. 2d 735 (1st Cir. 1977), *cert. denied*, 434 U. S. 860 (1977) (PB, 12); *Mercury Motor Express, Inc. v. Brinke*, 475 F. 2d 1086 (5th Cir. 1973) (PB, 15) and *Warshawsky & Co. v. Arcata National Corp.*, 552 F. 2d 1257 (7th Cir. 1977) (PB, 12). By contrast, Petitioner's motion to enjoin does not involve its claims for relief or the merits of its complaint.



The interlocutory decision of the District Court is one of numerous procedural rulings that are routinely made by trial courts. Congressional policy prohibits interlocutory appeals of these decisions. The interlocutory order of the District Court, over which the Court of Appeals declined to exercise jurisdiction, can be compared to a trial court's order denying class certification, which this Court has held to be nonappealable: [6]

> "The order denying class certification in this case did not have any such 'irreparable' effect. It could be reviewed both prior to and after final judgment; it did not affect the merits of petitioner's own claims; and it did not pass on the legal sufficiency of any claims for injunctive relief." *Gardner v. Westinghouse Broadcasting Company, supra*, 437 U. S. at 480-481.

The order below by the Court of Appeals is consistent with the Congressional policy against piecemeal appeals. This Court so stated forcefully in *Switzerland Cheese Association v. Horne's Market*, 385 U. S. 23 (1966):

> "Unlike some state procedures, federal law expresses the policy against piecemeal appeals. . . . Hence, we approach this statute [28 U. S. C. § 1292 (a)(1)] somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders. . . . Orders that no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1)." *Id.*, 385 U. S. at 24-25.

6. As with the question of class certification, the fact that the District Court denied the motion to enjoin without prejudice to renewal in the future if circumstances should warrant shows that there are no irreparable consequences flowing from that order. *See, Gardner v. Westinghouse Broadcasting Co., supra* at 480.

## CONCLUSION

The issues raised by the petition are not special and important matters for certiorari. The decision is consistent with this Court's interpretation of federal law and congressional policy. The decision does not conflict with decisions of other courts of appeals. The decision correctly dismissed for lack of jurisdiction an interlocutory appeal from the trial court's ruling which did not affect the merits of the controversy. The petition for certiorari should be denied.

Respectfully submitted,

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